Supreme Court, U.S.
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No. 03-1384

IN THE

Supreme Court of the United States

CHERYL JANE FOLLOWELL,
AS PERSONAL REPRESENTATIVE OF THE ESTATE OF
BETTY JEAN GURLEY,
Petitioner,

v.

GEORGE E. MILLS, JR.,
CHAPTER 7 TRUSTEE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a federal bankruptcy court may utilize the doctrine of res judicata to avoid addressing factual disputes and summarily disallow a claim by a non-debtor spouse for the value of her separate ownership interest in property which is included in the debtor's bankruptcy estate pursuant to 11 U.S.C. § 541 thereby unlawfully taking the non-debtor spouse's property.

Whether the plain language of 11 U.S.C. § 502(h) permits the transferee of property to assert a claim against a debtor's estate for the value of her independent interest in the property received when the transferred property is later recovered by a bankruptcy trustee?

PARTIES TO THE PROCEEDING

There are no parties other than the ones named in the caption. There were no other parties in the proceedings below, however, Betty Jean Gurley died after the filing of the notice of appeal and prior to the filing of the briefs in the Eleventh Circuit. Pursuant to FED. R. APP. P. 43(a)(1), Cheryl Followell, executrix for the Estate of Betty Jean Gurley, was substituted as the Appellant in the proceeding below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Cheryl Followell, as executrix for the estate of Betty Jean Gurley, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-3a) was entered December 31, 2003, and is not reported. The order of the United States District Court for the Middle District of Florida, Ocala Division (App. 4a-5a) was entered on February 27, 2003, and is not reported. The Memorandum Opinion and

Judgment of the United States Bankruptcy Court for the Middle District of Florida (App. 31a-50a) were entered on December 27, 2001 and are not reported.

JURISDICTION

The opinion and final judgment of the court of appeals were entered December 31, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Bankruptcy Code, 11 U.S.C. §§101(10)(B), 502(h) 541 and 550 are reprinted in App. 51a-61a.

STATEMENT OF THE CASE

1. William Gurley (the "Debtor") filed a voluntary chapter 7 petition under the United States Bankruptcy Code on July 26, 1995, in the United States Bankruptcy Court for the Middle District of Florida, Orlando Division (the "Florida Bankruptcy Court"). App. 33a. On April 26, 1996, George E. Mills, Jr., the Trustee in the chapter 7 case (the "Trustee"), commenced an adversary proceeding seeking to recover certain allegedly fraudulent transfers under the Florida Uniform Fraudulent Transfer Act, the Federal Debt Collection Procedures Act, and the Bankruptcy Code, 11 U.S.C. §§ 541 (a) and 544(b) (the "Transfer Case"). *Id.* The transfers in question were made in 1989, according to the Debtor's testimony, for "estate planning purposes." App. 15a.

In 1989, when the transfers at issue commenced, Mrs. Gurley personally held between $7 and $8 million in her own assets. App. 8a. A large portion of the assets transferred to Mrs. Gurley was real property in which she held a survivorship interest separate and apart from the interest transferred to her by the Debtor in and after 1989. App. 10a.

The Florida Bankruptcy Court in the Transfer Case held that despite the apparent transfer the Debtor continued to hold an equitable in interest in the property transferred to Mrs. Gurley and thus "[a]ll property transferred by the Debtor to his wife is property of the estate pursuant to 11 U.S.C. § 541(a)(1)."[1] App. 29a. The Florida Bankruptcy Court in the Transfer Case included all property held by Mrs. Gurley—including the $7 to $8 million in her own assets and her own survivorship interest in the real property—in her husband's bankruptcy estate. App. 30a.

2. Mrs. Gurley appealed the Florida Bankruptcy Court's decision in the Transfer Case contending that the transfers were valid transfers and that the statute of limitations for commencing the Transfer Case barred the Trustee's recovery. The Florida Bankruptcy Court's decision in the Transfer Case was affirmed by the Eleventh Circuit in an unpublished decision and this Court denied certiorari. *See Gurley v. Mills*, 532 U.S. 1009, 121 S. Ct. 1736 (Mem.), 149 L. Ed.2d 660 (2001).

3. As a result of the breadth of the bankruptcy court's Memorandum Opinion, Amended Judgment and Amended Permanent Injunction entered in the Transfer Case, Mrs. Gurley was forced to file a voluntary chapter 11 bankruptcy petition on October 22, 1997, in the United States Bankruptcy Court for the Western District of Tennessee (the "Tennessee Bankruptcy Court"). Mrs. Gurley immediately filed an adversary proceeding in the Tennessee Bankruptcy Court

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[1] The Florida Bankruptcy Court also held, with respect to a proprietorship known as Moltan Company, that the Debtor had failed to effectively deliver a deed of gift to Mrs. Gurley or to possess the requisite donative intent for a valid transfer of the assets. App. 29a. The deed of gift only purported to transfer certain personal property associated with the proprietorship, since all real property associated with the business had been separately transferred by validly executed, delivered and recorded deeds.

under 11 U.S.C. § 542 (the "Turnover Case") seeking a turnover of assets claimed by the Trustee to be only William M. Gurley's property and not property of Mrs. Gurley's bankruptcy estate. *See generally, In re Gurley*, 222 B.R. 124, 128-30 (Bankr. W.D. Tenn. 1998). The Trustee's argument in the Turnover Case was that the assets in question were "not property of this [Mrs. Gurley's chapter 11] estate based upon the Amended Judgment entered by Judge Briskman, or in the alternative that the Debtor [Mrs. Gurley] holds only bare legal title to the assets. . . ."[2] *Id.* at 131.

The Tennessee Bankruptcy Court, affording great deference to the Florida Bankruptcy Court's decisions,[3] nevertheless held that "[e]ach of the assets which was the subject of Judge Briskman's Amended Judgment [in the Transfer Case] *is property of the Debtor's* [Mrs. Gurley's] *estate*. *Id.* at 145 (emphasis added). Thus, the Tennessee Bankruptcy Court necessarily found that Mrs. Gurley also held interests in the same property under 11 U.S.C. § 541(a)(1).[4] The Trustee appealed from this decision but later dismissed his appeal.

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[2] In fact, the Trustee also contended in the Turnover Case that Mrs. Gurley, as the recipient of fraudulently transferred property, was limited to filing a claim under § 502(h) in her husband's chapter case. Supplemental Brief of George E. Mills, Jr., Chapter 7 Trustee of the Estate of W.M. Gurley, Case No. 97-35255-L, Adv. Proc. No. 97-1253 at p. 21 (Feb. 26, 1998).

[3] The Honorable Judge Jennie D. Latta, U.S. Bankruptcy Judge, Western District of Tennessee, specifically stated "[t]his Court will not consider issues decided by Judge Briskman [The Honorable Arthur B. Briskman, U.S. Bankruptcy Judge, Middle District of Florida], but rather will determine what effect shall be given to Judge Briskman's order in light of the petition filed by Mrs. Gurley." 222 B.R. at 130.

[4] Judge Latta intimates that Mrs. Gurley's interests are ownership interests when she found that "[t]here is no reason to believe that the transfers between Mr. Gurley and his wife were ineffective as between them." 222 B.R. at 139 (citing *Todkill v. Todkill*, 88 Nev. 231, 237, 495 P.2d 629, 632 (1972)(When a husband transfers title to separate property

Mrs. Gurley's chapter 11 case resulted in a confirmed plan of reorganization and was closed by Final Decree entered February 11, 2000. Mrs. Gurley paid to William M. Gurley's bankruptcy estate in excess of $23 million.[5] This sum represents the entire value of all the assets found to be fraudulently transferred and the entire value of the real and personal property in which both Mrs. Gurley and the Debtor held an interest, including the Moltan Company proprietorship.

The Tennessee Bankruptcy Court decided that it would value the Trustee's claim against Mrs. Gurley by applying values to various assets which the Florida Bankruptcy Court found had been improperly transferred. 222 B.R. at 145.

4. Mrs. Gurley filed Claim No. 4 on October 15, 1997, in the amount of $11,070,280.00 plus the unliquidated value of other assets. Claim No. 4 was amended on October 23, 1998 (Claim No. 8), and again on October 19, 1999 (Claim No. 9). App. 35a. The essence of Claim No. 9 is twofold. First, it is Mrs. Gurley's claim under § 502(h) of the Bankruptcy Code for the value of the assets she returned to her husband's estate. App. 35a-36a. It also represents the claim for the value of Mrs. Gurley's independent ownership interest in property which the Florida Bankruptcy Court included in her husband's estate and for which she paid the full value of to the Trustee. App. 36a.

5. The Trustee filed an objection to Mrs. Gurley's claim followed by a motion for summary judgment. App. 36a-39a. Mrs. Gurley, at the Florida Bankruptcy Court's direction,

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from his name to his wife's name, he is presumed to intend a gift to her, even though his original intent was to defraud creditors); *Burnham v. Burnham*, 343 So. 2d 639, 640 (Fla. Dist. Ct. App. 1977); and *Kinkead v. State*, 202 Tenn. 164, 168, 303 S.W. 2d 713, 715 (1957)).

[5] In fact, Mrs. Gurley paid the Trustee and all creditors one hundred per cent (100%) of their allowed claims with interest in less than three (2) years from the date of confirmation.

submitted Statements of Disputed Issues of Fact Requiring Resolution as to Claim No. 9 (the "Statement"). In the Statement, Mrs. Gurley succinctly demonstrated the disputed issues of fact and the proof to be submitted in connection with each disputed issue. Namely, proof as to the value of Mrs. Gurley's interest in the assets transferred to the Debtor's estate. The Trustee submitted proposed findings of fact and conclusions of law. The Florida Bankruptcy Court, adopting virtually verbatim the Trustee's proposed findings of fact and conclusions of law, disregarded the disputed issues of fact and held that it had already decided that Mrs. Gurley held no interest in the assets in question and, as such, could assert no claim under 11 U.S.C. § 502(h) for having returned the value of the assets to the Debtor's estate. App. 49a.

6. The Eleventh Circuit affirmed the Florida Bankruptcy Court's decision holding (i) that "the doctrines of res judicata and collateral estoppel bar relitigation" of the issues decided by the Florida Bankruptcy Court and the Tennessee Bankruptcy Court (App. at 3a) and (ii) that the Florida Bankruptcy Court "properly interpreted § 502(h)" in finding that "Mrs. Gurley did not have a prepetition claim against her husband." *Id.*

REASONS FOR GRANTING THE PETITION

This Court should grant this petition for a writ of certiorari because the Eleventh Circuit Court of appeals has decided an important question of federal bankruptcy law that (i) on the issue of res judicata, conflicts with this Court's decisions in *Archer v. Warner*, 538 U.S. 314, 123 S. Ct. 1462, 155 L. Ed.2d 454 (2003); *Brown v. Felsen*, 442 U.S. 127, 131, 99 S. Ct. 2205, 2209, 60 L. Ed.2d 767 (1979) and *Federated Dep't Stores, Inc. v. Moitie*, 452, U.S. 394, 398, 101 S. Ct. 2424, 2438, 69 L. Ed.2d 103 (1981); and (ii) on the issue of the allowance of a claim under 11 U.S.C. § 502(h), has not been, but should be, settled by this Court.

Res Judicata Issue.

The Florida Bankruptcy Court in the Transfer Case found that all property transferred by the Debtor to Mrs. Gurley was property of his bankruptcy estate pursuant to 11 U.S.C. § 541(a)(1). App. 29a. The Florida Bankruptcy Court in this same opinion also found that Mrs. Gurley owned assets totaling $7,005,700.00 in December 1988 and held interests in property owned as tenants by the entirety prior to any transfers from her husband. App. 8a.

In Mrs. Gurley's chapter 11 case, the Tennessee Bankruptcy Court held that Mrs. Gurley had interests in these same assets and that they were also property of her bankruptcy estate pursuant to 11 U.S.C. § 541(a)(1). *In re Gurley*, 222 B.R. 124, 138-39 (Bankr. W.D. Tenn. 1998). The Tennessee Bankruptcy Court later confirmed Mrs. Gurley's plan providing for the transfer of one hundred percent (100%) of the value of these assets to Mr. Gurley's chapter 7 trustee. This was done with the knowledge that Mrs. Gurley had a claim pending in the Florida Bankruptcy Court for the value of her interest being transferred to the chapter 7 estate.[6] *Id.* Mrs. Gurley's seeks allowance of her claim for the proportionate value of her interest in the assets transferred to her husband's chapter 7 estate.

Without doubt, each Bankruptcy Court has determined that both Mr. and Mrs. Gurley hold an interest in property that constitutes property of each spouse's respective bankruptcy estates pursuant to § 541(a). No court, however, has ever adjudicated the relative interest of each spouse in these assets. The Florida Bankruptcy Court found that Mr. Gurley held an interest in all property transferred to his wife but did not

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[6] This is self evident given that Claim Number 4 was filed almost an entire year prior to confirmation of Mrs. Gurley's plan. Moreover, Mrs. Gurley's plan expressly addressed and preserved her continuing interest in assets of and claims against her husband's chapter 7 estate.

quantify the extent of his interest or Mrs. Gurley's interest—it merely ordered the assets returned. The Tennessee Bankruptcy Court held that Mrs. Gurley also held an interest in this same property but, likewise, did not quantify the extent of her interest. Rather, it valued the assets the Florida Bankruptcy Court ordered to be returned. These two decisions are not inconsistent, irreconcilable or incompatible.

The lower courts however have ignored this Court's decisions on res judicata and used the doctrine to avoid addressing the fundamental factual disputes concerning the value of the relative ownership interests of the two (2) spouses in property in which each holds an interest. In so doing, the lower courts have created a mechanism whereby a bankruptcy trustee may strip a non-debtor spouse of the value of her interest in jointly owned property. Simply stated, the lower courts have summarily extinguished Mrs. Gurley's ownership interests in property without any compensation—even in the form of an unsecured claim against her husband's chapter 7 estate.[7]

This Court's decisions on the doctrine of res judicata in bankruptcy matters generally hold that "[a] final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Brown v. Felsen*, 442 U.S. 127, 131, 99 S. Ct. 2205, 2209, 60 L. Ed.2d 767 (1979)(quoting *Montana v. United States*, 440 U.S. 147, 153, 99 S. Ct. 970, 973, 59 L. E.d.2d 210 (1979)). *See also, Federated Dep't Stores, Inc. v. Moitie*, 452, U.S. 394, 398, 101 S. Ct. 2424, 2438, 69 L. Ed.2d 103 (1981).

In *Brown*, this Court addressed the question of whether res judicata barred a bankruptcy court from considering evidence extrinsic to a state court judgment and the record in a prior

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[7] Mrs. Gurley is not asserting a secured claim or a priority claim in her husband's estate. Rather, Mrs. Gurley is simply seeking recognition of her independent ownership interests as a claim, to be paid in the same priority as her husband's other creditors.

state suit when determining whether a debt previously reduced to judgment is dischargeable. *Id.* at 127-28. After considering the respondent's contention that the doctrine of "res judicata stops harassment and promotes the orderly processes of justice by encouraging the consolidation of the entire dispute between debtor and creditor into one prior proceeding" this Court in *Brown* however found that the interests of res judicata (encouraging reliance on judicial decisions, barring vexatious litigation and freeing the courts to resolve other disputes) were *not* served by foreclosing petitioner from submitting additional evidence.[8] *Id.* at 132.

Similarly here, Mrs. Gurley asked the Florida Bankruptcy Court to consider evidence of the value or her interest in property which had been included in her husband's bankruptcy estate. This evidence consisted of (i) a judicial determination from the Tennessee Bankruptcy Court holding that she did, in fact, possess an interest in the property; (ii) actuarial testimony concerning each spouse's relative interest in the property; and (iii) appraisal testimony for certain assets.

The *Brown* decision itself arguably countenances the submission of such additional evidence in a claims allowance proceeding, however, this case presents an additional and perhaps more compelling fact not present in *Brown*. Mrs. Gurley's claim under § 502(h) could not arise until after the transfers were set aside and the value of the transfers was returned to the estate. 11 U.S.C. § 502(d). *See In re Republic Trust & Sav. Co.*, 897 Fd.2d 1041, 1045-46 (10th Cir. 1990) *cert. denied by Hackler v. Langenkamp*, 498 U.S. 896, 111 S. Ct. 245, 112 L. Ed.2d 204, and *cert. granted, jmt. rev'd by Langenkamp v. Culp*, 498 U.S. 42, 111 S. Ct. 330, 112 L. Ed.2d 343 (1990)(reversed on other grounds). It is only after

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[8] This Court recognized that "[b]ecause res judicata may govern grounds and defenses not previously litigated, however, it blockades unexplored paths that may lead to truth. . . . It therefore is to be invoked only after careful inquiry." *Id.* at 132.

an adverse judgment and return of the property to the estate that a claim under § 502(h) can, by definition, arise.[9] *Id.* (stating "appellants cannot possibly become creditors of the estates until after the conclusion of the adversary proceedings [to avoid transfers] against them. Otherwise, a transferee who has a valid defense to a preference action and ultimately no liability to the estate would be permitted to vote on and object to a plan"). *Id.* at 1046 n.4. Forcing transfer recipients to litigate the allowance of claims under § 502(h) concurrently with the transfer avoidance proceedings serves neither the orderly process of justice nor the does it free the courts to resolve other disputes.

Remarkably, the lower courts here not only incorrectly applied res judicata to bar Mrs. Gurley's submission of evidence, they did so in the face of another judicial decision of a court of equal and competent jurisdiction which held that she possessed a recognizable interest in the property. Instead, the lower courts have held that the doctrine of res judicata applies to the decisions of the Florida Bankruptcy Court but not to the decisions of the Tennessee Bankruptcy Court. Even applying the doctrine of res judicata or collateral estoppel to the holding in the Transfer Case, the lower courts erred in that all that was necessary for the Florida Bankruptcy Court to include the property in the Debtor's bankruptcy estate was a finding that the Debtor had any "legal or equitable interest" in the property. By the same token, the Tennessee Bankruptcy Court held in the Turnover Case, that Mrs. Gurley *also* held a "legal or equitable interest" in the same property. 122 B.R. at 145 (emphasis added).

Thus, two courts of equal and concurrent jurisdiction held that each spouse possessed an interest in the same property.

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[9] In fact, if Mrs. Gurley had been successful in her appeal in the Transfer Case, then there would be no claim, as she would not have been required to turnover to her husband's bankruptcy estate any property.

Neither court, however, has ever adjudicated the relative interests of the two spouses in the property in question.[10]

This Court's more recent decision in *Archer v. Warner*, 538 U.S. 314, 123 S. Ct. 1462, 155 L. Ed.2d 454 (2003) reaffirms the concept that res judicata is not a bar to inquiry into matters beyond the scope of the judgment or record in another court where the policies of res judicata are not implicated. *Id.* at 321. The lower courts erred in applying the doctrine of res judicata to bar Mrs. Gurley's claim and their decisions are contrary to this Court's decisions in *Archer*, *Brown* and similar cases.

11 U.S.C. § 502(h) Issue.

Beyond the preclusion issues, the lower courts erred in their unsupported reading of 11 U.S.C. § 502(h) and the allowability of claims thereunder. The plain language of section 502(h) of the Bankruptcy Code affords Mrs. Gurley a claim. Section 502(h) provides that a claim arising from recovery of property under §§ 522, 550, or 551 shall be allowed or disallowed the same as if it had arisen prepetition. 11 U.S.C. § 502(h). App. 58a. Section 550 provides the mechanism for recovery of transfers and incorporates, among other sections, § 544 governing fraudulent transfers. 11 U.S.C. § 550. App. 60a-61a.

First, the plain language of § 502(h) holds that a claim arising from recovery of property under § 550 shall be

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[10] It is not legally or intellectually inconsistent for this result to obtain. Again, it was not necessary for the Florida Bankruptcy Court to adjudicate Mrs. Gurley's interests to find that her husband held an interest in the same property. Similarly, the Tennessee Bankruptcy Court did not ignore the Florida Bankruptcy Court's finding that Mr. Gurley held an interest in the property. Rather, it recognized Mr. Gurley's interest as a claim against Mrs. Gurley's chapter 11 estate. What Mrs. Gurley seeks is merely an evidentiary hearing to determine the extent of her interest in the total bundle of assets which were returned to her husband's estate.

allowed or disallowed the same as if it had arisen prepetition. App. 58a. Section 502(h) does not provide, as the lower courts held, that only *certain* claims for recovery of property under § 550 shall be allowed or disallowed. Secondly, the plain language of § 101(10)(B) defines a "creditor" as an entity that has a claim against the estate of kind a specified in § 502(h), among others. 11 U.S.C. § 101(10)(B)[11] App. 59a.

Further, the Eleventh Circuit Court of Appeals' decision below is in conflict with the holding of the First Circuit Court of Appeals' decision in *Max Sugarman Funeral Home, Inc. v. A.D.B. Investors*, 926 F.2d 1248 (1st Cir. 1991), which held that a recipient of a fraudulent transfer which is avoided by the trustee is in fact entitled to file a proof of claim for sums returned to the bankruptcy estate. *Id.* at 1257. *Max Sugarman* involved an action to avoid fraudulent and preferential transfers of property and to subordinate the recipient's claim. Judge Cyr found that certain transfers were avoidable as fraudulent transfers and then rather routinely stated that the recipient could "file a proof of claim pursuant to §§ 501(d) and 502(h) upon compliance with the payment or turnover order of the bankruptcy court." *Id.*

Concomitantly, the plain language of § 101(10)(B) defines a "creditor" as an entity that has a claim against the estate of kind a specified in § 502(h), among others. 11 U.S.C. § 101(10)(B). App. 59a. "Claim" is defined generally as a right to payment or a right to an equitable remedy. 11 U.S.C. § 101(5)(A) and (B). By operation of § 502(h) and § 550, Mrs. Gurley is a creditor and holds a claim. The language of these sections could not be any clearer. The plain meaning of legislation should be conclusive and Mrs. Gurley is entitled to a claim. *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235,

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[11] Certain courts also hold that the dollar limitations on eligibility for relief under chapter 13 take into account potential § 502(h) claims. *See In re Toronto*, 165 B.R. 746 (Bankr. D. Conn. 1994) and *In re Scovis*, 231 B.R. 396 (9th Cir. BAP 1999).

241, 109 S. Ct. 1026, 103 L. Ed.2d 290 (1989). What is left for determination is the amount of her claim about which there are genuine factual disputes. Moreover, Mrs. Gurley's independent ownership interests in property should be recognized as a "claim" and entitled to the protections afforded holders of claims. To hold otherwise, as the lower courts have done, unlawfully strips Mrs. Gurley of her property.

Assuming for argument that § 502(h) is ambiguous, a review of the legislative history indicates a conscious decision by the Congress to include fraudulent transfer recipients in the class of creditors entitled to assert claims under § 502(h). As COLLIER ON BANKRUPTCY observes, the current version of § 502(h) is "immensely broader" than the proposed version of the section which would have limited claims under § 502(h) only to those arising from avoidance under § 547.[12] 3 LAWRENCE P. KING, ET AL., COLLIER ON BANKRUPTCY, ¶502.08 (15th Ed. 1991). *See also*, § 504(h) of H.R. 8200, Feb. 1978 and S. 2266, July 1978. The current edition of COLLIER states that "[t]he import . . . of § 502(h) is that *regardless of the circumstances by which the trustee or debtor recovers property* under section 522, 550 or 553, the claim which arises from recovery will be allowed . . . with status as a prepetition claim existing at the time of the filing of the debtor's petition." 4 LAWRENCE P. KING, ET AL., COLLIER ON BANKRUPTCY, ¶502.09[2] (15th Ed. Revised 1999)(emphasis added).

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[12] The legislative history of section 502(h) states as follows:

> Section 502(h) of the House amendment *expands* similar provisions contained in the Senate amendment to indicate that *any* claim arising from recovery of property under section 522(i), 550, or 553 shall be determined as though it were a prepetition claim.

124 CONG. REC. H11089 *reprinted in* 5 U.S.C.C.A.N. 95th Cong. 2d Sess. (1978) p. 6450 (Sept. 28, 1978) and 124 CONG. REC. S17406 *reprinted in* 5 U.S.C.C.A.N. 95th Cong. 2d Sess. (1978) p. 6518 (Oct. 6, 1978) (emphases added).

The Trustee himself recognizes the correctness of this analysis because, he made this identical argument to the Memphis Bankruptcy Court in the Turnover Case. *See* note 2 *supra*. The Trustee argued to the Memphis Bankruptcy Court that "[a]s the recipient of [a] judicially determined fraudulent conveyance, B.J. Gurley [Mrs. Gurley] *is limited to filing a proof of claim in W.M. Gurley's bankruptcy estate*. Supplemental Brief of George E. Mills, Jr., Chapter 7 Trustee of the Estate of W.M. Gurley, Case No. 97-35255-L, Adv. Proc. No. 97-1253 at p. 21 (Feb. 26, 1998)(emphasis added). Further, the Trustee clearly and unmistakably argued to the Memphis Bankruptcy Court that "under section 502(h), B.J. Gurley [Mrs. Gurley], as the recipient of a fraudulent transfer who is forced to surrender the property by virtue of the Orlando Bankruptcy Court's judgment *has the right to file a claim against W.M. Gurley's estate*." *Id.* at 22 (emphasis added). Remarkably, the Trustee even went so far as to point out to the Memphis Bankruptcy Court that "[t]he fact that a fraudulent transferee may file a proof of claim in the transferor's bankruptcy court is found in several authorities." *Id.* at 21.

These positions demonstrate (i) the correctness of Mrs. Gurley's analysis of § 502(h) and (ii) the inescapable fact that the Trustee knew of the existence of Mrs. Gurley's claims and acquiesced in her pursuit of such claims. Moreover, he advocated in the Memphis Bankruptcy Court for the result that he now opposes in the Florida Bankruptcy Court. This evidence is what the Florida Bankruptcy Court refused to consider when it summarily elected to selectively apply res judicata to bar Mrs. Gurley's claim.[13]

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[13] The Trustee argued in the Memphis Bankruptcy Court that Mrs. Gurley's "claim to the fraudulently transferred property is deemed to have arisen before the date W.M. Gurley filed for bankruptcy." Supplemental Brief of George E. Mills, Jr., Chapter 7 Trustee of the Estate of W.M. Gurley, Case No. 97-35255-L, Adv. Proc. No. 97-1253 at p. 22 (Feb. 26, 1998). Incredibly, the Trustee, in his proposed findings of fact submitted to the Florida Bankruptcy Court (which were adopted verbatim by the

If for no other reason, this Court should grant this petition due to the injustice wrought by the lower courts' decisions which is demonstrated by the following non-exclusive list of examples:

Mrs. Gurley and her husband acquired 235.25 acres of real property in Hardeman County, Tennessee on July 12, 1985. The couple owned the property as tenants-by-the entireties which was later transferred to the sole ownership of Mrs. Gurley in 1989. App. 10a.[14] The lower courts' application of res judicata and misapplication of 11 U.S.C. § 502(h) resulted in the disallowance of Mrs. Gurley's claim and unlawfully stripped her of the value of her own interest in this property. Res judicata and § 502(h) cannot be read to authorize a bankruptcy trustee to extinguish an existing interest in property without recognizing the value of that interest in some fashion. Given the existence of Mrs. Gurley's independent interests in this property, how can it be said that she has no claim for the value of her own interest this property?

Mrs. Gurley and her husband also acquired 50 acres of real property in Hardeman County, Tennessee on August 29, 1985. The couple owned the property as tenants-by-the entireties which was later transferred to the sole ownership of Mrs. Gurley in 1989. App. 10a and n.14. The lower courts' application of res judicata and misapplication of 11 U.S.C. § 502(h) resulted in the disallowance of Mrs. Gurley's claim and unlawfully stripped her of the value of her own interest in this property. Res judicata and § 502(h) cannot be read to

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Florida Bankruptcy Court), asserts that "Mrs. Gurley's claim fails because she did not have a claim against the Debtor before the Petition Date." App. 44a.

[14] This and the other properties listed herein are the properties referred to by the Florida Bankruptcy Court as "numerous tracts of real property located in the 4th and 5th civil District Hardeman County, State of Tennessee" and referenced by plaintiff's exhibits 57-83. App. 10a.

authorize a bankruptcy trustee to extinguish an existing interest in property without recognizing the value of that interest in some fashion. Given the existence of Mrs. Gurley's independent interests in this property, how can it be said that she has no claim for the value of her own interest this property?

On May 10, 1984, Mrs. Gurley and her husband acquired 80 acres of real property in Hardeman County, Tennessee. The couple owned the property as tenants-by-the entireties which was later transferred to the sole ownership of Mrs. Gurley in 1989. App. 10a and n.14. The lower courts' application of res judicata and misapplication of 11 U.S.C. § 502(h) resulted in the disallowance of Mrs. Gurley's claim and unlawfully stripped her of the value of her own interest in this property. Res judicata and § 502(h) cannot be read to authorize a bankruptcy trustee to extinguish an existing interest in property without recognizing the value of that interest in some fashion. Given the existence of Mrs. Gurley's independent interests in this property, how can it be said that she has no claim for the value of her own interest this property?

On May 2, 1978, Mrs. Gurley and her husband acquired 171.25 acres of real property in Hardeman County, Tennessee. The couple owned the property as tenants-by-the entireties for eleven (11) years and which was later transferred to the sole ownership of Mrs. Gurley in 1989. App. 10a and n.14. The lower courts' application of res judicata and misapplication of 11 U.S.C. § 502(h) resulted in the disallowance of Mrs. Gurley's claim and unlawfully stripped her of the value of her own interest in this property. Res judicata and § 502(h) cannot be read to authorize a bankruptcy trustee to extinguish an existing interest in property without recognizing the value of that interest in some fashion. Given the existence of Mrs. Gurley's independent interests in

this property, how can it be said that she has no claim for the value of her own interest this property?

On July 2, 1981 Mrs. Gurley and her husband acquired 68.2 acres of real property in Hardeman County, Tennessee. For eight (8) years the couple owned the property as tenants-by-the entireties then later transferred to the sole ownership of Mrs. Gurley in 1989. App. 10a and n.14. The lower courts' application of res judicata and misapplication of 11 U.S.C. § 502(h) resulted in the disallowance of Mrs. Gurley's claim and unlawfully stripped her of the value of her own interest in this property. Res judicata and § 502(h) cannot be read to authorize a bankruptcy trustee to extinguish an existing interest in property without recognizing the value of that interest in some fashion. Given the existence of Mrs. Gurley's independent interests in this property, how can it be said that she has no claim for the value of her own interest this property?

Mrs. Gurley and her husband acquired 30.2 acres of real property in Hardeman County, Tennessee on September 13, 1984. The couple owned the property as tenants-by-the entireties which was later transferred to the sole ownership of Mrs. Gurley in 1989. App. 10a and n.14. The lower courts' application of res judicata and misapplication of 11 U.S.C. § 502(h) resulted in the disallowance of Mrs. Gurley's claim and unlawfully stripped her of the value of her own interest in this property. Res judicata and § 502(h) cannot be read to authorize a bankruptcy trustee to extinguish an existing interest in property without recognizing the value of that interest in some fashion. Given the existence of Mrs. Gurley's independent interests in this property, how can it be said that she has no claim for the value of her own interest this property?

Mrs. Gurley and her husband acquired lots 8 & 9 of the Pinecrest Subdivision in Hardeman County, Tennessee on October 16, 1981 and owned the property for eight (8) years.

App. 10a and n.14. The lower courts' application of res judicata and misapplication of 11 U.S.C. § 502(h) resulted in the disallowance of Mrs. Gurley's claim and unlawfully stripped her of the value of her own interest in this property. Res judicata and § 502(h) cannot be read to authorize a bankruptcy trustee to extinguish an existing interest in property without recognizing the value of that interest in some fashion. Given the existence of Mrs. Gurley's independent interests in this property, how can it be said that she has no claim for the value of her own interest this property?

Mrs. Gurley and her husband acquired 5.34 acres of real property in Hardeman County, Tennessee on August 8, 1988. The couple owned the property as tenants-by-the entireties which was later transferred to the sole ownership of Mrs. Gurley in 1989. App. 10a and n.14. The lower courts' application of res judicata and misapplication of 11 U.S.C. § 502(h) resulted in the disallowance of Mrs. Gurley's claim and unlawfully stripped her of the value of her own interest in this property. Res judicata and § 502(h) cannot be read to authorize a bankruptcy trustee to extinguish an existing interest in property without recognizing the value of that interest in some fashion. Given the existence of Mrs. Gurley's independent interests in this property, how can it be said that she has no claim for the value of her own interest this property?

For nearly twenty (20) years Mrs. Gurley and her husband owned 42.5 acres of real property in Shelby County, Tennessee as tenants-by-the entireties which was later transferred to the sole ownership of Mrs. Gurley in 1989. App. 10a and n.14. The lower courts' application of res judicata and misapplication of 11 U.S.C. § 502(h) resulted in the disallowance of Mrs. Gurley's claim and unlawfully stripped her of the value of her own interest in this property. Res judicata and § 502(h) cannot be read to authorize a bankruptcy trustee to extinguish an existing interest in property without recognizing the value

of that interest in some fashion. Given the existence of Mrs. Gurley's independent interests in this property, how can it be said that she has no claim for the value of her own interest this property?

Mrs. Gurley and her husband acquired 20 acres of real property in Shelby County, Tennessee on January 15, 1988. The couple owned the property as tenants-by-the entireties which was later transferred to the sole ownership of Mrs. Gurley in 1989. App. 10a and n.14. The lower courts' application of res judicata and misapplication of 11 U.S.C. § 502(h) resulted in the disallowance of Mrs. Gurley's claim and unlawfully stripped her of the value of her own interest in this property. Res judicata and § 502(h) cannot be read to authorize a bankruptcy trustee to extinguish an existing interest in property without recognizing the value of that interest in some fashion. Given the existence of Mrs. Gurley's independent interests in this property, how can it be said that she has no claim for the value of her own interest this property?

Mrs. Gurley and her husband acquired 62 acres of real property in Shelby County, Tennessee on October 12, 1984. The couple owned the property as tenants-by-the entireties which was later transferred to the sole ownership of Mrs. Gurley in 1989. App. 10a and n.14. The lower courts' application of res judicata and misapplication of 11 U.S.C. § 502(h) resulted in the disallowance of Mrs. Gurley's claim and unlawfully stripped her of the value of her own interest in this property. Res judicata and § 502(h) cannot be read to authorize a bankruptcy trustee to extinguish an existing interest in property without recognizing the value of that interest in some fashion. Given the existence of Mrs. Gurley's independent interests in this property, how can it be said that she has no claim for the value of her own interest this property?

Mrs. Gurley and her husband acquired 5.28 acres of real property in Shelby County, Tennessee on October 12, 1984. The couple owned the property as tenants-by-the entireties which was later transferred to the sole ownership of Mrs. Gurley in 1989. App. 10a and n.14. The lower courts' application of res judicata and misapplication of 11 U.S.C. § 502(h) resulted in the disallowance of Mrs. Gurley's claim and unlawfully stripped her of the value of her own interest in this property. Res judicata and § 502(h) cannot be read to authorize a bankruptcy trustee to extinguish an existing interest in property without recognizing the value of that interest in some fashion. Given the existence of Mrs. Gurley's independent interests in this property, how can it be said that she has no claim for the value of her own interest this property?

Mrs. Gurley and her husband acquired 20.29 acres of real property in Shelby County, Tennessee on December 5, 1980. The couple owned the property as tenants-by-the entireties which was later transferred to the sole ownership of Mrs. Gurley in 1989. App. 10a and n.14. The lower courts' application of res judicata and misapplication of 11 U.S.C. § 502(h) resulted in the disallowance of Mrs. Gurley's claim and unlawfully stripped her of the value of her own interest in this property. Res judicata and § 502(h) cannot be read to authorize a bankruptcy trustee to extinguish an existing interest in property without recognizing the value of that interest in some fashion. Given the existence of Mrs. Gurley's independent interests in this property, how can it be said that she has no claim for the value of her own interest this property?

The above list includes some of the more prominent examples; however, there are numerous other examples of assets of a similar character.

The Florida Bankruptcy Court found that "[a]ccording to financial records, the Debtor's assets totaled approximately

$15,730,342 and Mrs. Gurley's assets totaled approximately $7,005,700 in December 1988." App. 8a. The Florida Bankruptcy Court went on to find that the "[f]inancial records reflect that the Debtor's assets totaled approximately $1,791,370 and Mrs. Gurley's assets totaled $24,369,568.00 in December 1989" (App. 11a) and that the "[f]inancial records reflect that the Debtor's assets totaled approximately $258,459.00 and Mrs. Gurley's assets totaled approximately $23,305,307 in July 1995 [immediately preceding the Debtor's filing of the chapter 7 case]." App. 13a. The Trustee recovered approximately $23 million, thus it is apparent that the courts below have incorrectly used the doctrine of res judicata to strip the approximate $7 million beginning balance that the Florida Bankruptcy Court acknowledged was owned by Mrs. Gurley. Neither res judicata nor § 502(h) can countenance such a result.

This Court must grant this petition for a writ of certiorari because the United States Court of Appeals for the Eleventh Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, and has decided an important federal question in a way that conflicts with relevant decisions of this Court. SUP. CT. R. 10(c). This is Mrs. Gurley's last opportunity to have some court review this matter and ensure that the ends of justice are served.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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